FILED BY CLERK
MAR 15 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE JUSTIN M.	2 CA-JV 2010-0113 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100JV200900658

Honorable Joseph R. Georgini, Judge
Honorable Stephen F. McCarville, Judge

VACATED

James P. Walsh, Pinal County Attorney
By Susan Crawford
Florence
Attorneys for State

Kessler Law Offices
By Eric W. Kessler
Mesa
Attorneys for Minor

E C K E R S T R O M, Judge.

Background

¶1 Appellant Justin M. was adjudicated delinquent in December 2009 and February 2010 after he admitted having committed various offenses as alleged in two separate delinquency petitions. In March 2010, the juvenile court placed Justin on juvenile intensive probation (JIPS) until his eighteenth birthday.[1] A petition to revoke probation was filed on June 21, 2010, asserting Justin had violated the conditions of his probation on two occasions earlier that month. At a July 1, 2010 hearing, Justin indicated his willingness to admit one of the allegations. However, after his probation officer informed the court that Justin and his family were moving to Texas and that he was "current" with his fines, the probation officer instead requested that the petition to revoke probation be dismissed and that Justin be discharged from probation. The minute entry from that hearing states that "[c]ounsel for [the] State requests that the minor be transferred on an Interstate Compact." In an order dated July 2, 2010, Pinal County Superior Court Judge Stephen McCarville stated:

> [T]he Order heretofore entered making the said minor a ward of this Court and placing said child under the supervision of the Pinal County Juvenile Probation Department be, and the same is hereby amended to remove the said minor from being a ward of this Court and to remove from intensive probation status successfully.

¶2 In a motion to reconsider filed on July 9, 2010, the state asked the juvenile court to rescind its order removing Justin from JIPS, reinstate the June 2010 petition to revoke probation "for good cause," and issue a warrant for Justin's arrest. The state explained that Justin had refused to move to Texas with his family and listed numerous instances in June 2010 showing that Justin's "track record [on JIPS] is not consistent with

[1]Justin will turn eighteen in June 2011.

successful completion of intensive probation, much less early termination of same." The state also asserted the court had removed Justin from probation over its objection, and that the probation officer had "failed to acknowledge and/or provide the Court (and the State) with accurate and up to date information prior to recommending early termination." At a July 14, 2010 hearing on the state's motion to reconsider, the court acknowledged that Justin's whereabouts were unknown and issued a warrant for his arrest. At that same hearing, Judge McCarville "rescind[ed]" his earlier order discharging Justin from JIPS and reinstated him on JIPS "*nunc pro tunc*" as of July 1, 2010. Justin appeared at an August 2, 2010 hearing before Pinal County Commissioner Craig Raymond who, on the court's own motion, reinstated the June 2010 petition to revoke probation and placed Justin in custody.

¶3 At an August 12, 2010 admission hearing, Justin admitted one of the allegations asserted in the June 2010 petition to revoke probation, an admission Judge McCarville found to be knowing, intelligent, and voluntary. In light of a pending dependency petition involving Justin before Pinal County Superior Court Judge Joseph Georgini, Judge McCarville set the disposition hearing before Judge Georgini at a later date. At the August 30, 2010 disposition hearing, Judge Georgini committed Justin to the Arizona Department of Juvenile Corrections (ADJC) for six months.

Discussion

¶4 On appeal, Justin argues he is entitled to relief because Judge Georgini's disposition ruling was "akin to a lateral appeal, where one Superior Court judge overrules another," and asserts that "Judges Georgini and McCarville evaluated the same conduct and came to diametrically opposed conclusions." However, by granting the state's motion to reconsider and rescinding his earlier order discharging Justin from probation,

we infer Judge McCarville acknowledged that Justin had not performed well on JIPS. Accordingly, it is not clear that Judge McCarville would have imposed a "diametrically opposed" disposition order than the one entered by Judge Georgini. In any event, the record simply does not support Justin's argument that Judge Georgini's disposition order constituted a "lateral appeal" of any ruling Judge McCarville had made. Although we reject this argument, we nonetheless vacate the court's disposition order based on Justin's second argument.

¶5 Justin contends that, because the juvenile court previously had terminated his probation, it did not have jurisdiction to revoke his probation and to sentence him to ADJC, in the absence of a subsequent delinquency adjudication. Justin did not challenge the court's jurisdiction on this ground below, and Arizona law is currently unsettled on the question of whether Justin is entitled to *de novo* appellate review of the error in question or whether he is entitled to relief only if we find fundamental, prejudicial error. *Compare State v. Maldonado*, 223 Ariz. 309, ¶¶ 2-3, 14-18, 223 P.3d 653, 654, 655-56 (2010) (narrowing type of jurisdictional errors raisable at any time in context of technical, remediable error), *with State v. Chacon*, 221 Ariz. 523, ¶ 5, 212 P.3d 861, 863-64 (App. 2009) (incorrectly using term "subject matter jurisdiction" but suggesting, in context similar to that here, that question of court's "power to hear a case . . . can never be forfeited or waived"). Because, for the reasons set forth below, we conclude the court erred fundamentally in reinstating Justin's probation and incarcerating him, we need not resolve the appropriate review standard applicable in the context of the substantial jurisdictional defect here.

¶6 We note at the outset that, in this court's order of January 4, 2011, we gave the state until January 14, 2011, an extension of the original filing date, to file an

answering brief. We warned that, if it did not file a brief by that date, the appeal would be deemed at issue and the state's failure to respond viewed as a confession of error as to any debatable issue raised by Justin. *See In re Pima County Juv. Action No. J-65812-1*, 144 Ariz. 428, 429, 698 P.2d 223, 224 (App. 1985) (confession of error doctrine applies to juvenile delinquency cases, which are quasi-criminal in nature). Nonetheless, even after this court granted an additional extension of the January 14 deadline, the state did not file an answering brief.

¶7 Section 8-202(G), A.R.S., provides that the juvenile court retains jurisdiction over a delinquent juvenile "for the purposes of implementing the orders made and filed in [delinquency] proceeding[s], until the child becomes eighteen years of age, unless terminated by order of the court before the child's eighteenth birthday." Similarly, A.R.S. § 8-246(A), provides that once the juvenile court acquires jurisdiction over a child, that jurisdiction is retained "until the juvenile attains eighteen years of age, unless sooner discharged pursuant to law." And, Rule 31(D), Ariz. R. P. Juv. Ct., permits the juvenile court to "terminate the probation of the juvenile at any time prior to the eighteenth . . . birthday of the juvenile upon the request of the juvenile probation officer."

¶8 Here, once the juvenile court terminated Justin's probation in July 2010, it no longer retained jurisdiction to do what it did: reinstate him on JIPS, reinstate the petition to revoke probation, revoke probation, and sentence him to ADJC. *See Andrew G. v. Peasley-Fimbres*, 216 Ariz. 204, ¶ 8, 165 P.3d 182, 184 (App. 2007) (§ 8-202(G) limits juvenile court's jurisdiction to the earlier of either the juvenile's eighteenth birthday or termination of jurisdiction "'by order of the court'"); *cf. Chacon*, 221 Ariz. 523, ¶ 6, 212 P.3d at 864 ("The superior court lacks jurisdiction to revoke probation once it has expired."). In the absence of some event invoking the court's jurisdiction over

Justin, which did not occur here, the court acted outside its authority by reinstating him on JIPS and, consequently, by reinstating the petition to revoke probation and ultimately committing him to ADJC.

¶9 We find this matter readily distinguishable from *State v. Brooks*, 161 Ariz. 177, 180, 777 P.2d 675, 678 (App. 1989), a case in which Division One of this court found the trial court properly had vacated its own order terminating Brooks's probation. In that case, the trial court ruled without knowing that the state had filed an objection to the request to terminate probation because Brooks had been charged with attempted first-degree murder, or that a petition to revoke was pending. *Id*. at 178, 777 P.2d at 676. Here, in contrast, when the juvenile court successfully terminated Justin's probation in July 2010, it was aware he had violated the conditions of his probation, a fact Justin acknowledged and was willing to admit. Unlike in *Brooks*, there simply was no mistake here. *Cf. State v. Lopez*, 96 Ariz. 169, 172, 393 P.2d 263, 265-66 (1964) (acknowledging inherent power of court to modify or vacate its own order as codified in Rule 60(c), Ariz. R. Civ. P., to provide relief from final judgment where grounds such as mistake, inadvertence, newly discovered evidence, or fraud exist). We also note that, although this court previously has found that a juvenile court has some "inherent power to modify or vacate an order previously made during the pendency of [a] cause," *Anonymous v. Superior Court*, 10 Ariz. App. 243, 247, 457 P.2d 956, 960 (1969), the facts here simply do not require that outcome.

¶10 The results here may have been different if a subsequent delinquency petition had been filed, providing the juvenile court jurisdiction over Justin. *See In re Stephanie N.*, 210 Ariz. 317, ¶ 20, 110 P.3d 1280, 1283 (App. 2005) (juvenile court retained jurisdiction over minor for purpose of adjudicating outstanding petition to

revoke probation, even though presumptive term of probation had expired). Instead, there simply was no event triggering the court's jurisdiction over Justin once it had discharged him from probation. Just as the court had the legal authority to place Justin on probation in the first instance, it had the authority to remove him from that status. *See* A.R.S. § 8-341; Ariz. R. P. Juv. Ct. 31.

¶11 In addition, as previously noted, the juvenile court's July 14, 2010 order reinstated Justin on JIPS "*nunc pro tunc* as of July 1, 2010." However,

> [t]he purpose of a *nunc pro tunc* order is to make the record reflect the intention of the parties or the court at the time the record was made, not to cause an order or judgment that was never previously made or rendered to be placed upon the record of the court. The object of such an entry is to correct the record to make it speak the truth and not to supply judicial action.

State v. Pyeatt, 135 Ariz. 141, 143, 659 P.2d 1286, 1288 (App. 1982) (citation omitted); *see* Ariz. R. Crim. P. 24.4 ("Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time after such notice, if any, as the court orders."). Therefore, because the court's original ruling reflected its intention at the time it was entered, its *nunc pro tunc* order was, in any event, inappropriate.

Disposition

¶12 Given the record before us, we find the juvenile court erred by reinstating Justin's probation and the petition to revoke probation, and by sentencing him to ADJC. In addition, we regard the state's failure to file an answering brief as a confession of error. Because the error here went to the foundation of the court's authority to impose any sanction at all upon Justin, and because Justin has been prejudiced by his resulting

unlawful incarceration, we find the error fundamental and prejudicial. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Therefore, we vacate the court's August 30, 2010, disposition order.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge